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ALEXANDER L. STEVAS,
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No. 82-15

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RAY E. OLIVER - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 2, 1982
CERTIORARI GRANTED JANUARY 24, 1983

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NOTE

The following opinions, decisions, judgments and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Order of the United States District Court for the Western District of Kentucky, suppressing evidence, dated November 14, 1980 .....Pet. App. 19

Memorandum Opinion of the United States District Court for the Western District of Kentucky, dated November 14, 1980 .....Pet. App. 21

Opinion of the United States Court of Appeals for the Sixth Circuit, dated August 7, 1981..Pet. App. 25

Opinion of the United States Court of Appeals for the Sixth Circuit, En Banc, dated May 5, 1982 .....Pet. App. 31

Judgment of the United States Court of Appeals for the Sixth Circuit, En Banc, entered May 5, 1982 .....Pet. App. 67

RELEVANT DOCKET ENTRIES

Date Filed	Entry
8/21/80	Complaint signed
8/22/80	Warrant issued
9/ 3/80	Indictment returned
11/ 3/80	Motion to Suppress
11/ 5/80	United States ordered to respond to Motion
11/13/80	Suppression Hearing
11/13/80	Response to Motion to Suppress
11/14/80	Motion to Suppress sustained; United States District Court for the Western District of Kentucky
11/19/80	Memorandum Opinion
11/20/80	Notice of Appeal by United States
8/ 7/81	Opinion of United States Court of Appeals for the Sixth Circuit, affirming
8/29/81	United States Petition for Rehearing En Banc
1/ 7/82	Petition for Rehearing granted
5/ 5/82	Opinion of United States Court of Appeals for the Sixth Circuit En Banc, reversing
5/ 5/82	Judgment of Court of Appeals
7/ 2/82	Petition for a Writ of Certiorari
8/ 5/82	United States Memorandum in Opposition
8/25/82	Reply to Memorandum in Opposition
9/17/82	Court orders United States to respond
10/20/82	United States Supplemental Memorandum in Opposition
11/15/82	Reply to Supplemental Memorandum in Opposition
1/24/83	Certiorari granted

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

CR 80-00005 BG

THE UNITED STATES OF AMERICA, - - - *Plaintiff,*

v.

RAY E. OLIVER, - - - - - - - *Defendant.*

TRANSCRIPT OF SUPPRESSION HEARING

At a session of said Court held in the Federal Courthouse in Bowling Green, Kentucky, on November 13, 1980.

Presiding: The Honorable Edward H. Johnstone
United States District Judge

Appearances:

For the United States: The Hon. Scott Wendelsdorf
Assistant United States Attorney

For the Defendant: The Hon. Robert L. Wilson
and
The Hon. David Smith

Reported By: James A. Joplin
Official Court Reporter
3213 Kentucky Avenue
Paducah, Kentucky 42001

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Bowling Green, Kentucky
November 13, 1980—10:40 A.M.

PROCEEDINGS

The Court: Call your first witness.
Mr. Wendelsdorf: I call Detective Ben Hadley.

BEN HADLEY being first duly sworn by the Court was examined and testified upon his oath as indicated as follows:

Direct Examination by Mr. Wendelsdorf

The Court: The purpose of this hearing will be to consider both the motion to suppress statements and the motion of the Defendant to suppress the evidence.

Q. State your name for the Court, please.
A. Detective Ben Hadley.
Q. And by whom are you employed?
A. Kentucky State Police.
Q. In what capacity?
A. Narcotics Agent.
Q. How long have you been with the Kentucky State Police?
A. A little over eight years.
Q. And with the narcotics division?

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A. Approximately seven years.
Q. And where are you assigned?
A. I was assigned to work Columbia Post as resident agent.
Q. Now, on or about the 18th day of July of this year, did you receive an anonymous tip that there was Marijuana growing on the Ray Oliver farm?

A. Yes, sir, I did.

Q. Do you know who gave you that tip?

A. No, sir, I don't. It was an anonymous phone call which came in the post.

Q. Had you received only one tip that Mr. Oliver was growing Marijuana?

A. No, sir. I had heard people in the community. They more or less said that there must be something going on and so forth, that, you know, it didn't look right down on Ray's farm.

Q. Now, based on that information, did you decide to go to Mr. Oliver's farm on or about the 18th day of July, 1980?

A. Yes, sir, I did.

Q. Would you tell the Court first of all, who went with you? Were you by yourself?

A. No, sir, Detective Jimmy Antle was with me.

Q. Is he with the Kentucky State Police?

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A. Yes, he is.

Q. Tell the Court what you did and what, if anything, the Defendant said to you when you went to his farm on the 18th day of July, 1980?

A. On the 18th, it was around two o'clock when Detective Antle and myself arrived at the farm. We drove as the road goes through the farm, you come to a gate which at this time I backed up, and there is an oil tank sitting on the right just before you get to the gate at Mr. Oliver's barn. We parked the car there, walked down the road, down to the barn. At that point there was a camper set up in front of the barn. There wasn't anyone around that we could see, so we just walked on down the road, which makes a circle and comes back up on the back side of the farm, and when we got to the back side of the farm there was a gentleman standing in front of the camper

who had started hollering at us to come back, that there was no hunting allowed, and to come back to the camper. At this point we turned around and started back to the camper when he yelled. We couldn't see anybody around the camper when we got back up there. At that point we thought they might not know who we were. We didn't have guns. I hollered out when he hollered at us that we were State Police and

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no one came up, and I walked over to the camper and looked in the door, and didn't see anyone. I closed the door and went on down to where we originally started. When we got on the lower part of the farm we saw a Marijuana field. We came back to the camper and hollered a few more times. I went back and looked in the camper and it was locked at this time. We got in the car, and I started back to Crealsboro, and I met Mr. Oliver.

The Court: Was it a public road that you took to get to the Oliver farm?

A. It's the Swann Pond Bottom Road is all I know.

The Court: It is a public thoroughfare?

A. Yes, sir.

The Court: How do you spell it?

A. Well, it's the Rockhouse Bottom Road or Swann Pond.

Q. I think we can stipulate it was a public thoroughfare.

Mr. Wilson: It was the Rockhouse Bottom Road.

Q. But it was a public road?

A. Yes.

Q. And it turned to what?

A. The Sugar Camp Road.

Q. Is that a public road?

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A. Yes.

Q. From this road, did you turn onto his property?

A. This road as you turn off the Rockhouse Bottom Road onto the Sugar Camp Road, it dead-ends at his farm.

Q. This is a public road which actually enters upon Mr. Oliver's property?

A. Yes, sir.

Q. Now, did you go by his house, his living area?

A. Yes, sir.

Q. Alright, how far away from the house was this barn and camper that you are talking about?

A. I'd say approximately three-quarters of a mile.

Q. Alright, did you go in the barn?

A. No, sir.

Q. Was there a fence around the camper or the barn?

A. There was a gate before you get to the barn.

Q. Alright, do you mean just blocking the road?

A. Yes, sir.

Q. Alright, now, how far then would you say the Marijuana field that you discovered was from the house, the living area on the Oliver farm?

A. I'd say from Mr. Oliver's house to the Marijuana field going the roadway would be about a mile.

Q. And how far from the barn and the camper?

A. There was just, you have to go down and around to

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come back up to the Marijuana field, but if you went straight across the field, it would be about a quarter of a mile, I'd say, if that far.

Q. Now, you say when you returned to the house you met Mr. Oliver?

A. As we was coming back out of Crealsboro, we had left his house. There wasn't no one at his house.

Q. You were back on the public road at this time?

A. Yes, sir.

Q. How was he going, moving or walking?

A. He was driving. I turned and was going to follow him back to his house, but before he got to his house he turned off into a small gravel driveway, and I pulled in behind him.

Q. What kind of vehicle were you in?

A. A black Firebird.

Q. It wasn't a State Police Vehicle?

A. No, sir. Well, it's a State Police vehicle, but not marked.

Q. What happened?

A. When I pulled up behind him I got out and started to walk up. Mr. Oliver opened the door and kind of leaned around and said, Hello, Mr. Hadley. I know what you are looking for. Just go on down there. He said, I've got to take some drinks to a

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neighbor's house, some Cokes or milk or something, and I will meet you. I told him I would meet him at the gate, which is on down past his house.

Q. Now, had you asked him anything prior to his statement to you?

A. No, sir. I didn't identify myself to him. As I was walking up to the car he turned around and said, Mr. Hadley, I know what you are looking for and I will show you where it's at.

Q. He knew who you were?

A. Yes, sir.

Q. He said he knew what you were looking for and he would meet you at the house?

A. Yes, sir.

Q. Is that what you did?

A. I told him I would meet him at the gate, and he said he would be on down there. So, me and Detective Antle went on down and in about fifteen minutes Mr. Oliver drove up, and he says, Boys, leave your car there and get

in the car with me and I will show you where it's at.

Q. The second statement was leave your car here and get in my car. Was this in response to any question you had asked or any statement by you at all?

A. No, sir.

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Q. Did he have any difficulty hearing you?

A. Yes, sir.

Q. Had you known Mr. Oliver had a hearing problem prior to this time?

A. I had never talked to Mr. Oliver, but in the process of talking to him I could tell that he had a hearing problem, yes, sir.

Q. Did you compensate for his apparent difficulty in hearing you?

A. Yes, sir, I raised my voice to where he understood what I was saying.

Q. How close were you standing to him?

A. We were face to face, you know, just right together.

Q. And you did raise your voice?

A. Yes, sir.

Q. Now, when you were having these conversations, were his answers to you germane to your questions? Did they appear to be responsive to your questions?

A. Yes, sir, they were.

Q. Was it your opinion that he understood what you were asking him?

A. Yes, sir.

Mr. Wilson: Objection as to what he understood. It is irrelevant.

Mr. Wendelsdorf: Well, it is

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very relevant, the purpose.

The Court: I will overrule. We are not bound by the Federal Rules in the suppression hearing. That goes both ways.

Q. So then you got into Mr. Oliver's car?

A. No, sir.

Q. What happened?

A. At this particular time he said to get in his car and leave mine there, and he would show us where it's at. I advised Mr. Oliver, I already know where it's at. I have done seen it, and there is no use, you know. I said, what we need to do now is try to figure out some way to get it destroyed, and I also asked him, let's see, I asked him who was tending it.

Q. Now, at this time or prior to this time, did you advise Mr. Oliver of his Constitutional rights?

A. Yes, sir, I did.

Q. When was that?

A. That was as soon as I told him that I knew where it was at, and you know, that I didn't need to go down and look at it, that I already knew where it was at.

Q. Exactly what rights did you advise him of?

A. I told him that he was under arrest for cultivating Marijuana, and that he had a right to remain silent, anything he said could and would be used against him

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in a court of law, that if he needed an attorney and could not afford one, one would be appointed for him by the courts.

Q. Alright now, how did you convey these rights to him?

A. Orally, in that order.

Q. Did you give him anything in writing?

A. No, sir. I asked him . . .

Q. When you say you gave it to him orally, again, how did you speak, in a normal conversational tone of voice?

A. No, sir. I asked him each time when I got through, I asked him, do you understand your rights? Ray said, Yes, I do.

Q. Alright, to each one of these rights?

A. Yes, sir.

Q. Now, following you giving him his rights, what did he say and do from that point on?

A. He started, I started asking him about who was tending or taking care of the Marijuana. I asked him was it his corn. He said, No, I've got it leased. I asked him who it was leased to. He said he didn't know, that it was two guys from Taylor County, that he thought they were from Taylor County. I asked him did he have a written lease, and he said no, that

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it was just an oral agreement.

Q. What did he say about the trailer?

A. I asked him who the camper belongs to. He said, It belongs to the people taking care of the corn, that they moved it in approximately two months prior to this.

Q. And he advised you that he had an oral lease with these individuals?

A. Yes, sir, he did.

Q. Now, go on. What else did he say? Your questions to him and his answers to you.

A. I asked him about who the guys were. He said that he didn't know. I asked him how did they contact him. He said that he was in a restaurant in Russell Springs. They approached him, and that they just wanted to lease it, and he leased it to them. I kept trying to find out who it belonged to and so forth like that, which he said he did not know, and then we started, I asked him did he have any way of destroying the Marijuana. He said that he would

get his neighbor's tractor to come up and destroy it, that he would pay him to do it, and while we were standing there talking and waiting for the tractor to get there Ray asked me, he said, Mr. Hadley, would I be losing a hundred thousand dollars here? I said, Ray,

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I don't know. I have no idea, you know. I said, it depends on what kind of market you can get for it, and so forth. I asked him, Mr. Oliver, if you don't know who is growing this, how were you planning to get your money when they harvested it? He said, I would have got my money. I said, in my opinion if you have leased this land to people you don't know, you would have not found them. He said, You would have found their bodies floating in the river.

Q. Did Mr. Oliver ask you how you found out about it?

A. Yes, sir, and he emphasized that he knew who did it, and that it would be very easy for them to have a hunting accident.

Q. Now, where were you when this conversation took place?

A. We were down about the barn.

Q. Now, about the lease, whether or not he was going to lose a hundred thousand dollars from this, where did that conversation take place?

A. We were standing at the barn.

Q. Now, did you proceed to the Marijuana field then?

A. Yes, sir, when the tractor got there. They brought two tractors, one with a disc, and one with a bushhog. Mr. Oliver left shortly after that to go drive one of the tractors up.

Q. Were you aware of a second Marijuana field on the

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Oliver farm?

A. No, sir, I wasn't.

Q. How did you become aware of it?

A. When a gentleman arrived with the tractor he said, which field is it, and he called a certain field, and Ray said no, no, it's in the other one. So we went to that field. We destroyed that field, and then I turned around to Mr. Oliver. I asked Mr. Oliver, what about the other field? I said, is there any Marijuana in it? He said, well, I guess we'd better go look. I said, Well, are there any use in bringing both tractors or anything? He said, Yeah, you had better bring them. At that time he showed us how to get to the other field, and over to where the Marijuana was, and he showed it to us.

Q. Answer the Defense's questions, if you would.

Cross-examination by Mr. Wilson

Q. Mr. Hadley, when you saw Ray Oliver on the road, the public highway leading down to his house, what was your intentions at that time as an officer?

A. To stop him.

Q. You were at that time intending to restrict his movement then? You were in charge of what he was going to do after that?

A. I was going to stop him and talk to him.

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Q. I understood you to say a moment ago you wanted to follow him to his home.

A. I figured that's where he was going, because I didn't have a blue light, so I was going to follow him where he was going.

Q. Was Ray Oliver free at that time to go to Russell Springs or anywhere he wanted to?

A. There wasn't anything said about that.

Q. If he told you, I am going to Jamestown, or I am going to Louisville for a couple of weeks, what would you have done?

A. I don't know.

Q. Was he restricted in your mind at that time, or under your control?

Mr. Wendelsdorf: Objection. The restriction has to be in the mind of the Defendant, not the police officers.

The Court: Overruled.

Q. You had him there to stop him?

A. I was going to question him about the Marijuana field, yes, sir.

Q. You stopped him on the road for the purpose of questioning him about the Marijuana?

A. Yes, sir.

Q. Which you had already seen?

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A. Yes, sir.

Q. Now, for the record, did you ever obtain any search warrant to search this property?

A. No, sir.

Q. Did you ever obtain a warrant for the arrest of Mr. Oliver prior to arresting him?

A. I issued him a citation at the barn.

Q. Did you take him into custody?

A. Later on that day, after we got the Marijuana destroyed, yes, sir.

Q. From the time you stopped him on the road, did you ever let him outside your custody? Was he always within your reach at that time until you took him to jail?

A. Repeat the question.

Q. Did he ever leave your presence during this time, after you stopped him on the road, until the time you took him to jail?

A. When I stopped him on the road he went on up to wherever he was going to deliver the drinks for his neighbor and I went on down to the barn and waited for him to come on down there. When he came down after we had talked a while, he left to go get a tractor.

Q. Okay, from that point and time he met you at the gate

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and the time you took him to the jail, did he ever leave the custody of you or Mr. Antle?

A. After he returned with the tractor?

Q. Did you have him in your custody?

A. Well, we were destroying the Marijuana, and they were there, yes, sir.

Q. And that took place at his property?

A. Yes, sir.

Q. Now, when you stopped on the road, did he say he knew . . . I understood you to say he said, I know what you are looking for. I will meet you down at the house. Did he say what that was?

A. No, sir.

Q. He didn't say anything about Marijuana or anything?

A. No, sir.

Q. Now, did he sign any waiver of his rights?

A. No, sir.

Q. Did he sign any confession?

A. No, sir.

Q. Did he sign any written statement whatsoever?

A. He was not asked to.

Q. The only admissions then you have are oral admissions?

A. Yes, sir.

Q. Now, when the hundred thousand dollars was mentioned, who else was present down there at the farm then?

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A. Detective Antle.

Q. Was David Davenport, the local newspaper editor, there?

A. Not at this time, no, sir.

Q. Had you sent for him?

A. No, sir, I did not send for him.

Q. Who did send for him?

A. I don't know if, evidently when I called the post to request for a unit to come down there, I think Detective Antle or, I don't really remember who asked for the newspapers to come down. I may have. I don't know.

Q. Did you give a statement to Mr. Davenport or anybody about what you valued the crop at?

A. I may have gave a rough estimate.

Q. And that was four hundred thousand dollars?

A. I usually figure a rough estimate of fifty thousand dollars an acre.

Q. And this talk you had with Mr. Oliver, that was more in jest than anything, was it not? You all were talking back and forth?

A. We were just having a general discussion.

Q. And he laughed during this period of time when he was talking about that, didn't he?

A. He laughed all the time we was there.

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Q. He never did take this very seriously down there, did he?

A. No, sir.

Q. And many of his questions you said you asked him whether or not he understood his rights, and he merely said, yes?

A. He said yes, I know what you are saying, Mr. Hadley.

Q. Did he repeat those rights back to you, or say anything about getting an attorney?

A. No, sir, I don't think so.

Q. But his mood was a jovial laughing type mood down there?

A. Yes, sir, until we started destroying the Marijuana.

Q. Now, this gate, let's go to the gravel road you referred to. You referred to it as a public road. Do you know that of your knowledge?

A. It has a county road sign on it.

Q. I am talking about the gravel road.

A. The gravel road has a county road sign, Sugar Camp Road sign on it.

Q. It doesn't have a road that says this is a county road, does it?

A. It's . . .

Q. It just has a marker that says Sugar Camp Road, doesn't it?

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A. Yes, sir.

Q. And again, I ask you, to your knowledge, is that a public or private road?

A. To my knowledge, it's a public road.

Q. Other than that sign being there, do you know that?

A. Other than it being a gravel road and maintained by the County, or State, or whatever.

Q. Well, do you know that it is maintained by the county when the facts will show that Mr. Oliver furnishes the gravel for that road? You wouldn't know that of your knowledge, would you?

A. No, sir.

Q. Now, as you go down to Mr. Oliver's house you leave any semblance of a public road, don't you, to get to the barn where the camper is?

A. It's just the farther you go the smaller the road gets.

Q. That's not a public road, is it?

A. I don't know. The way I understand it, years ago it used to be a public.

Q. I am asking you what you know, not what you you understand. You, yourself knew it wasn't a public

road, didn't you? You knew you were on Mr. Oliver's property, didn't you?

A Yes, sir, I did.

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Q. And you knew you were there without a warrant?

A. Yes, sir.

Q. And you said you came to a gate before you got down to this trailer?

A. Camper.

Q. Camper. Was there a lock on that gate?

A. I don't remember.

Q. You don't remember seeing a locked gate there across the road?

A. It could have very well been, because I didn't climb over the gate or nothing. There was no fence at one end, and there was a path where people had been walking around the gate, and I just walked around it.

Q. But the road, whatever it was, at that time it was a narrow farm road and there was a locked fence or a gate?

A. Possibly so. I know the gate was there.

Q. And the property was posted, was it not?

A. Yes, sir.

Q. And you went on beyond the posted signs into this property?

A. Yes, sir.

Q. Now, where did you first observe the Marijuana? Where were you standing when your first saw it yourself?

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A. I was standing right at the Marijuana field.

Q. Could you see the Marijuana field from the truck camper?

A. Yes, sir.

Q. Could you see it from the locked gate?

A. You could see the field. You could not stand there and identify that that was Marijuana over there, no, sir.

Q. So at the locked gate at that time you couldn't see any contraband on Mr. Oliver's property?

A. True.

Q. Now, after the Marijuana was destroyed or at any time, did you make a more thorough investigation of this camper that was there?

A. Not until after the Marijuana was destroyed. Mr. Oliver advised that it did not belong to him. It belonged to the people that was raising the Marijuana.

Q. I am asking you if you made an investigation of what was in the camper. Did you go in there?

A. Yes, sir, after we got the Marijuana destroyed.

Q. What did you find in there?

A. In reference to what?

Q. Articles. Did you find beer there?

A. There was beer sitting on the outside in a cooler,

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yes, sir.

Q. And iced down?

A. Yeah.

Q. And ice on it?

A. Yes.

Q. And did you find a refrigerator there?

A. No, sir. Yeah, but it wasn't plugged up.

Q. Did you find anything in the refrigerator?

A. No, sir, I don't think so.

Q. Did you look in it? Did you find some eggs and bacon down there somewhere?

A. There was eggs and bacon in the cooler.

Q. Did it appear to be inhabited by someone as a home, or a place to stay?

A. Yes, sir.

Q. What did you do with this home?

A. I confiscated it.

Q. How did you confiscate it?

A. I went down there and got it?

Q. And loaded it on a truck and hauled it off?

A. Yes, sir.

Q. What type of warrant did you have for that?

A. I didn't have any.

Q. What kind of court order did you have for it?

A. I didn't have any.

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Q. What else did you take?

A. I took the coolers. There was a pick-up truck camper top that was there that Mr. Oliver advised that belonged to them, and what camping supplies there was there.

Q. Did you also look in Mr. Oliver's barn there?

A. Look in it?

Q. Did you go inside the barn?

A. No, sir.

Q. Nobody went inside the barn?

A. No, sir. There were hogs in the barn and we didn't go inside the barn, or I didn't.

Q. Now, you say when you asked Mr. Oliver did he have any other fields, he said we had better look and see?

A. I asked him, and he said we had better check on it.

Q. He didn't say anything about any more Marijuana?

A. I asked him should we bring the tractors, and he said, Yeah, we had better bring the tractors.

Q. This other field, is it in the same general area as the first field?

A. There is a strip of woods and a gulley between the two fields which I hadn't even noticed the other field being over there.

Q. Well, describe if you would, Officer, to the Court the topography of the land, what it is bounded by,

[25]

between what farms, a farm belonging to Campbell?

A. I don't know.

Q. On one side it is bounded by the Cumberland River?

A. Yes, sir.

Q. And on one side you had the locked gates and the posted signs. Is that right?

A. Yes, sir.

Q. This tip that you got, Mr. Hadley, do you know who that person was that called?

A. No, sir, I don't.

Q. What information did you receive from that tip?

A. That Mr. Ray Oliver had a large amount of Marijuana growing on his farm, and it was on the Sugar Camp Road, to follow that road.

Q. How long have you been involved in narcotics investigation with the Kentucky State Police?

A. Around seven years.

Q. Are you also involved in that same general area with other fields of Marijuana?

A. Yes, sir.

Q. Do the State Police have available to them airplanes for the surveillance of crops?

A. I have never been able to get one.

Q. Do you not have cases pending in Marion County, Kentucky, where airplanes were actually used for this

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purpose?

A. No, sir.

Q. You don't have any cases pending in the Western District of Kentucky where surveillance was by airplane?

A. No, sir, helicopters.

Q. But you had helicopters available to you?

A. The only way I got the helicopter, I know a guy on the Jefferson County Police. He is a Jefferson County

Policeman, and after we got to getting all of these complaints about the Marijuana, then we started getting the helicopter and was able to use the helicopter.

Q. But you do have a helicopter that is useable and can be used for this?

A. If I am able to borrow it from Jefferson County.

Q. And you can use that helicopter, can you not, to make your surveillance without getting on the property, could you?

A. At the time we went to Mr. Oliver's?

Q. I am asking about now.

A. We do now, but not at that time.

Q. And the Marion County cases were a week or two later?

A. That's right.

Mr. Wilson: That's all.

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Redirect Examination by Mr. Wendelsdorf:

Q. Mr. Hadley, when you initially stopped Mr. Oliver, he indicated to you that he would meet you at the house?

A. Yes, sir.

Q. Then he went off and you don't know where he went?

A. He said he was going to deliver some drinks up to a neighbor's house.

Q. You didn't put a blue light on him or anything when he stopped?

A. No, sir.

Q. He pulled over?

A. Yes, sir.

Q. And he got out of his vehicle?

A. He just opened the door and kind of leaned out.

Q. He acknowledged your identity?

A. Yes, sir.

Q. And said he knew what you were there for?

A. Yes, sir.

Q. And you didn't tell him not to leave his car or not to leave?

A. No, sir.

Q. He did go somewhere, didn't he?

A. Yes, sir.

Q. And when you went to the Marijuana field and he went

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to get a tractor, did he leave?

A. Yes, sir.

Q. He could have gone to Louisville then, couldn't he?

A. Yes, sir.

Q. Was he in your custody then?

A. No, sir.

Q. You said Mr. Oliver was doing a lot of laughing, and Mr. Wilson was good enough to point out that you have been involved in a quite a few Marijuana investigations in this part of the State?

A. Yes, sir.

Q. Do people take growing Marijuana very serious down there in Marion County?

A. No, sir.

Q. Have you been successful down there?

A. No, sir.

Q. The most they get down there is a $250.00 fine, don't they?

A. Yes, sir.

Q. And do you know that the courts just don't take this very seriously down there, do they?

A. True.

Q. And nothing happens to people that grow Marijuana in Russell and Marion Counties?

A. The results I have had have been a joke.

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Q. Was there a fence at that gate?

A. There was a metal gate with two posts on each side. I'd say possibly it did have a lock on it. I don't remember, but there was a path going around the end of it.

Q. The gate merely blocked the road?

A. Yes, sir.

Q. There was no obstruction whatsoever to a person on foot?

A. No, sir.

Mr. Wendelsdorf: Thank you.

Mr. Wilson: May I ask one more question?

The Court: Yes, sir.

Re-cross-examination by Mr. Wilson

Q. One thing I forgot to ask you awhile ago, you say that you saw a person at the barn?

A. Yes, sir.

Q. And this person hollered at you at the barn and said get off the land, no hunting?

A. He said, No hunting is allowed, come back up here.

Q. Okay. Now, at that time you hadn't seen the Marijuana, had you?

A. No, sir.

Q. And at that time, you were ordered off the land?

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A. He didn't say get off, he said there's no hunting allowed. Come back up here.

Q. When Mr. Oliver left the farm, he was to go after a tractor, to come back, was he not?

A. Yes, sir.

Q. And he was doing what you had directed him to do?

A. I did not direct him. I suggested to him, I said, we've got to have some way of destroying it. Do you know of anybody that's got a tractor that we can destroy it with,

and he said, Well, my neighbor down here, and he said, I will go down and get him.

Q. But that specific limited purpose, to go after a tractor, was the only time he was allowed to leave?

A. To get the tractor, was the only time he left.

Mr. Wilson: That's all.

The Court: Mr. Hadley, you say the property was posted. Will you tell me how it was posted?

A. There was a No Trespassing Sign, I think, Your Honor. I don't remember for sure.

The Court: Where was the No Trespassing Sign?

A. It was on the gate.

The Court: On the gate itself?

A. Yes, sir.

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The Court: Were there other signs around the property?

A. That's the only one that I saw.

The Court: Thank you. Anything further?

Mr. Wendelsdorf: No, Your Honor.

The Court: Do you have witnesses?

Mr. Wilson: Yes, Mr. Oliver.

RAY OLIVER 11:16 A.M. being duly sworn by the Clerk of Court, was examined and testified upon his oath as indicated as follows:

Direct Examination by Mr. Wilson:

The Court: Mr. Wilson, has your attorney advised you that the statements made here in this hearing are introduced for restricted purposes? However, they may be used for impeachment and other purposes as provided by the law? Does he understand that, Mr. Wilson?

Mr Wilson: Your Honor, I have not told him that specifically. I told him he doesn't have to testify and we

have talked about him testifying here, and he has chosen to do so.

The Court: Very well, just so he understands. If you are satisfied, the Court is satisfied.

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Mr. Oliver, can you hear me here?

A. Yes, I do.

Q. State your name, please.

A. Edward Ray Oliver.

Q. How old are you, Mr. Oliver?

A. Sixty-one.

Q. Have you been in the courtroom while we have been having this hearing?

A. Been here?

Q. Yes.

A. Yes, I have been sitting over there.

Q. Have you heard what the witnesses have said? Did you understand what Ben Hadley said?

A. Just a word now and then.

Q. Mr. Oliver, do you remember the day you were arrested on July 18th of this year?

A. Yes, I do.

Q. And who arrested you?

A. Ben Hadley.

Q. Was anybody with him?

A. Jimmy Antle.

Q. Where were you at when they arrested you?

A. Well, first I was up there on the road taking a neighbor some stuff, and him and Jimmy Antle was pulled in behind me and stopped me, and he told me

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he had been down to my place and found some stuff, and he asked me where are you going now, and I said I am taking a neighbor some stuff and drinks to his place. He told me so go on and he waited at the church house, and

he came back and he followed me to the house. I let my wife out and took the groceries in. Then I told Hadley and Antle if they wanted to, they could ride up to my place with me, and they said they had done been up there.

Q. How far do you live from the nearest town?

A. Oh, I'd say four-tenths of a mile.

Q. From the nearest town?

A. From the nearest town?

Q. Yes.

A. It's some twenty miles.

Q. And what is that town?

A. Jamestown.

Q. And the next nearest town would be what?

A. Russell Springs.

Q. How far is it to there?

A. Twenty-two.

Q. Now, you live at the bottom of Rockhouse Bottoms. Is that true?

A. That's right.

Q. Now, what type of farming do you do there, Mr. Oliver?

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A. Well, I have not farmed any myself for about twelve or fifteen years.

Q. Do you have any equipment?

A. No, sir, I don't.

Q. Do you have a tractor?

A. No.

Q. Now, when Mr. Hadley was down there, did you know him?

A. Yes, I did.

Q. How did you know him?

A. I have known for a long time.

Q. How far is it to Adair County from where you live?

A. I'd say fourteen miles.

Q. That's to Adair County or Columbia?

A. Adair County line.

Q. And is Mr. Hadley from Adair County?

A. Yes, he is.

Q. So, you knew what he would be down there for as he came down, would you, or would you not?

A. No, I did not know what he wanted.

Q. Now, Mr. Oliver, was that place posted down there?

A. Yes it was.

Q. How was it posted?

A. Well, along my road there it's posted. There's four different signs that are along the road, and then up

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there at the gate there is No Trespassing there, and it is posted.

Q. Is there a fence on part of that property?

A. Like you go up by the road this way on the left, there's a fence from there up around to the woods and joins Cananser.

Q. Is there a fence between you and Cananser?

A. Yes, there is.

Q. Who else do you join there?

A. On the north side would be the river and then Coleman Campbell has a line fence.

Q. Is it fair to say, or is it true that all of your farm is fenced or posted, one or the other, where this Marijuana was found?

A. Yes, I've got a fence around the road down there, and there's a gate that the Pyle boys took down to get through, and then over there at the back of the field they made just a gap there.

Q. You are talking about the Pyle boys. Who is that?

A. Well, they are the ones that's got my bean ground leased.

Q. What type of ground is this, or did you have a lease to this place where the Marijuana was?

A. Yes, I did.

Q. Who was that leased to?

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A. Joe Davis and Jimmy McCullen.

Q. Do you know where they are from?

A. They told me they was from Adair County.

Q. Did you find out they might be from somewhere else?

A. Yes, another fellow was talking to them, and they told him they was from another place.

Q. Where was that?

A. Russell County.

Q. Did anybody say they told them they were from Taylor County?

A. A neighbor lady said they did.

Q. Did you know these people that leased from you?

A. Yes.

Q. Now, have you been able to find them?

A. No, I have not.

Q. But that area they had leased, was that all posted?

A. Yeah.

Q. Now, when Mr. Hadley was down there talking to you, did you understand what he told you?

A. Well, I'm pretty sure I understood most of it.

Q. Now do you have any problem with your hearing?

A. If you don't talk loud, I don't hear it.

Q. Did he tell you you had a right to remain silent and a right to have a lawyer, and you didn't have to say anything?

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A. Today is the first time he said that to me.

Q. Did any officer, after you was arrested, tell you that?

A. As we was coming up 379, David Bunch and Roger Pierce, David told me my rights.

Q. David Bunch is who?

A. State trooper.

Q. When was this that he told you that?

A. In the neighborhood of eight o'clock on the 18th that night.

Q. Was this after Ben Hadley had left?

A. No. They picked me up from the house and Hadley and Jimmy Antle was still up at my place.

Q. Did you give any permission to Ben Hadley to come on your land down there?

A. At no time.

Q. Did you ever tell Ben Hadley that you waived your Constitutional rights and you wanted to make a statement?

A. No, sir.

Q. Did they ever ask you to sign anything, Ray?

A. No, they didn't.

Q. Did you have any talk with them about how much money that Marijuana was worth?

A. At no time.

Q. Were you laughing and joking with him while he was

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down there?

A. Yes. We was laughing up there.

Q. Did you ever tell him that the Marijuana was any part of yours?

A. No, because I had my land leased. I didn't have any part of it.

Q. Now, this gravel road, who puts the gravel on that road that comes up to your house?

A. The County has put some, and I put some, but what caused the gravel road on up there, at one time we had two oil wells pumping up there, and we graveled it,

the men who had the place leased graveled it over to the barn and to the tanks over there.

Q. Over to the back of the farm where the Marijuana was found, is there any road over there?

A. No, no.

Q. How do people get over there?

A. They went down the edge of the field.

Q. Is there car tracks going through there, or a path?

A. A path.

Q. Now, this gate that was down there, was that locked?

A. Yes, it was.

Q. The one that had the No Trespassing sign on it?

A. That's right.

Mr. Wilson: If Your Honor

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please, I have previously shown the Government copies of pictures I want to introduce and I would like to introduce some of those here.

The Court: Very well.

(Whereupon documents were shown to Mr. Wendelsdorf by Mr. Wilson.)

Q. Mr. Oliver, I am going to show you some pictures and see if you can identify them. Is this a picture of the barn on your property?

A. Yes, sir.

Mr. Wilson: I would like to have this marked as Exhibit 1 for identification.

Mr. Wendelsdorf: Your Honor, I have no objection to any of these pictures being admitted.

The Court: Let them all be admitted for the purpose of this hearing.

Q. Ray, I am going to show you Defendant's Exhibit 1. What is this in the right-hand side of the picture?

A. That's the barn.

Q. Is this the barn at your place?

A. That's right.

Q. Now, there appears to be a field over here.

A. That's my corn field.

Q. Now, who had that leased, if anybody?

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A. Joe Davis and Jimmy McCullen.

Q. Was there any Marijuana in this field found by anybody?

A. No, there wasn't.

Q. Now, what's behind the corn field?

A. That's the river over there.

Q. What's between the river and the cornfield there?

A. Timber.

Q. What's behind that timber?

A. Well, on over the bank, the river.

Q. Where was the Marijuana found in relation to this picture?

A. On beyond to the right of that.

Q. Okay. Now, this is Defendant's Exhibit 2. What is that?

A. That's as you go up, that's the front of my barn.

Q. Okay now, where would the Marijuana patch be in that picture?

A. It would be in here to the right.

Q. And there again, what is this on Exhibit 3?

A. That's the back of my barn.

Q. And where would the Marijuana patch be in relation to that?

A. At the very right.

Q. Can you stand at the barn and see the Marijuana?

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A. At no time.

Q. Could you see it from any position?

A. No.

Mr. Wilson: Could I have this marked as Defendant's Exhibit 4?

Q. I will show you one more now, Mr. Oliver. What's that right there? Is that your cornfield down there?

A. This is it right there. That's bushes and things.

Q. Was this taken in your field there?

A. Yeah.

Q. Now, what's this behind the field there in the back of the picture? Is that a row of trees?

A. You can see corn. This is the cornfield here, one cornfield, and then on down here to the right of this is the other cornfield where the Marijuana was.

Q. Where is your barn at now from right here? Is it up in here?

A. It's back this way.

Q. Is it hidden by the trees?

A. Yeah.

Q. So, when you are down there . . .

A. That's right.

Q. When you are standing in the Marijuana field, do the trees hide the barn?

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A. You can't see the barn.

Mr. Wilson: If Your Honor please, that's all the questions I have at this time.

The Court: Very well.

Cross-examination by Mr. Wendelsdorf:

Q. Mr. Oliver, can you hear me alright?

A. Okay.

Q. If you can't, let me know and I will speak louder.

A. Okay.

Q. How far from your house was the field with the Marijuana?

A. About a mile and four-tenths.

Q. Who owned the trailer that was found there by your barn?

A. I own it now, but Jimmy McCullen and Joe Davis did own it, but I had it later.

Q. Alright, and you said that you had leased this property to Mr. McCullen and Mr. Davis?

A. That's right.

Q. And was this a written lease?

A. Yes, it is.

Q. Do you have a copy of that lease with you?

A. Yes.

Q. Does your attorney have it?

A. That's right.

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Mr. Wilson: I furnished that, didn't I?

The Court: Was it furnished in discovery?

Mr. Wendelsdorf: I don't have a copy.

Mr. Wilson: I only have the original.

Mr. Wendelsdorf: Was it in this package here?

Mr. Wilson: According to my cover letter, it was.

Mr. Wendelsdorf: It must have got left out. That's alright.

Q. Well now, your attorney has handed me a piece of paper. Let me show it to you. Now, is this the lease that you are talking about?

A. That's right.

Q. Alright, and this lease is dated April first, 1980?

A. That's right.

Q. And it reads, I, Joe Davis and Jim Culver, leased twenty acres of land from Ray Oliver for six months for the sole purpose of growing corn.

A. That's right.

Q. And it's signed by Joe Davis and Jim Culver?

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A. That's right.

Q. Alright. Now, how much did they lease this land from you for?

A. Eight hundred dollars.

Q. Why wasn't that in the lease?

A. Pardon?

Q. Why didn't you put that in the lease?

A. They didn't put it on there, but that's the way they gave me the lease.

Q. So, this lease came from Mr. Davis and Mr. Culver?

A. That's right.

Q. Now, when Mr. Hadley asked you who the people were who leased the land, you told him you didn't know, didn't you?

A. No, sir.

Q. Did you tell him at that time that Mr. Culver and Mr. Davis were the ones that leased your land?

A. No, sir.

Q. Did he ask you who leased the land?

A. Yes, sir.

Q. What did you tell him?

A. I told him if I could think of their names I would tell him.

Q. And have you ever told him who they were?

A. Yes.

[45]

Q. When?

A. Now.

Q. Before today you didn't tell him who they were though, did you?

A. I told him one's name was Joe. That's all I did tell him.

Q. The point is, you knew who those boys were when Mr. Hadley asked you, didn't you?

A. Pardon?

Q. You knew when he asked you the first time?

A. Did I know when he asked me?

Q. Yes, sir.

A. I sure did.

Q. Why did you tell him you didn't know who they were?

A. I didn't tell him that.

Q. What did you tell him?

A. I said if I could think of their names I would tell him.

Q. But you didn't, did you?

A. No, I didn't.

Q. Now, was this the only piece of your property you leased? Did you lease other parts of your property?

A. Did they lease other parts?

Q. Did other people lease other parts of your property?

A. Yes, sir.

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Q. You don't do any farming yourself?

A. No, I don't.

Q. How many people lease property from you, would you say?

A. There's four.

Q. And do you do any of the work on these fields when you lease them?

A. No, I don't.

Q. Do you go up there and tend them, take a look at them, and check them from time to time?

A. No, sir, I don't.

Q. So in other words, when somebody leases property from you, let's say for six months, for all intents and purposes, that's their land for six months and you don't bother with it. Is that what you are saying? In other

words, Mr. Culver here and Mr. Davis leased this property from you for six months?

A. That's right.

Q. You considered it their land for six months?

A. That's right.

Q. And you didn't go up there and didn't fool with it at all?

A. No, sir.

Q. As far as you were concerned, they might as well have owned the property for six months?

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A. That's right.

Q. Now, when you were first stopped by Detective Hadley, did he put a blue light on you, a siren?

A. That, I couldn't say. I didn't know they was after me until I turned left on this gravel road, and then I don't know what made me notice them, but anyway I noticed the car behind me, and I stopped. Then Hadley got out and then he showed me in his pocket book he was a narcotics agent there, and Jimmy Antle, by that time he was out and I know Jimmy, and he showed me. They asked where I was going, and I told them I was going to a neighbor's to take some drinks and things.

Q. You knew who Detective Hadley was?

A. That's right.

Q. And did you call him by his name when you saw him?

A. I don't remember.

Q. Alright, did you tell him that you knew why they were there?

A. No, sir.

Q. Did you go on and deliver your drinks?

A. Yes, I did.

Q. They didn't arrest you when they stopped you, did they?

A. No.

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Q. They let you go?

A. (The witness nods yes.)

Q. Alright, did they tell you that you couldn't go deliver the drinks? You said you delivered some drinks.

A. I sure did.

Q. Did they say you couldn't do that, or did they let you go ahead and do it?

A. They let me do it.

Q. You told them you would meet them at your house?

A. That's right.

Q. And you delivered the drinks and came back to the house and met them?

A. They was waiting at the church house.

Q. Where is that? Is that on your property?

A. No, sir. The road I was going on over there to take these drinks, it's on that road.

Q. And then you went to your farm with them?

A. Went from there to my home, and let my wife out and took the groceries in, and then we went on up to the farm.

Q. And then you went up to the field?

A. No, sir.

Q. When did you go to the field?

A. Pardon?

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Q. When did you go to the field?

A. We went to the barn there and I asked Hadley what was he waiting on, and he said we was waiting on David Davenport and Doc Petty to show him the way down here, and I asked him would it be alright to go ahead and feed, and they said go ahead and feed, so I fed and watered my hogs, and when I come out Hadley told me this, we will

need some tractors to destroy these, and would you get a tractor to destroy these, and I said I would.

Q. Did you leave the farm to go get a tractor?

A. Yes, I did.

Q. How long were you gone?

A. Well, I drove my car there and drove the tractor back. I'd say a half hour or longer.

Q. Alright, now Detective Hadley told the Court that you told him that if these two fellows left without paying you for the lease that they would find their bodies floating in the river. Did you tell him that?

A. No, sir.

Q. Okay. Mr. Hadley said that you asked him if you were losing a hundred thousand by them destroying that Marijuana. Did you ask him that?

A. No, I didn't.

Q. Did you tell him that you knew who had tipped off

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the police to the Marijuana and that person could have a hunting accident?

A. I had no idea who turned me in.

Q. Well, did you tell Mr. Hadley that whoever turned you in could have a hunting accident?

A. What was that?

Q. Did you tell Detective Hadley that whoever turned you in could have a hunting accident?

A. No.

Q. Who are these two fellows that you leased the land to? Do you know them?

A. Jimmy Pyles and Eddie Voilles.

Q. Well now, I am talking about the land where the Marijuana was.

A. No, sir. I misunderstood you there.

Q. Okay. I don't want you to misunderstand me, the land where the Marijuana was found, you said you leased to a Mr. Joe Davis and Jimmy Culver.

A. That's right.

Q. Now, do you know who those two fellows are and did you know before you leased it?

A. Do I know who I leased the land to?

Q. Did you know them, these two fellows?

A. I sure do.

Q. Do you know where they live?

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A. Know where they live?

Q. Yes.

A. They told me they lived in Adair County.

Q. Had you known them before they leased the land from you?

A. For a good while.

Q. Have they leased land from other people to your knowledge?

A. Not as I know of.

Q. There is a lot of Marijuana growing up in Russell County and Marion County isn't there?

A. Not as I know of.

Q. You knew these two fellows were growing Marijuana and you just didn't want to bother them. Isn't that right? Did you know they were growing Marijuana up there?

A. No, sir.

Q. Now, how did they pay the eight hundred dollars, by check or cash?

A. Cash.

Q. Did you give them a receipt?

A. No, I didn't.

Q. Did you keep a record of receiving the eight hundred dollars?

A. No.

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Q. You don't keep any books or accounts or anything?

A. No.

Mr. Wendelsdorf: Okay, that's all the questions I have, Your Honor.

Mr. Wilson: Could I ask one or two more questions?

The Court: Yes, sir.

Redirect Examination by Mr. Wilson:

Q. Mr. Oliver, how far did you go in school?

A. Sixth grade.

Q. Have you had any education after that?

A. No, sir.

Q. What have you done for a living all your life?

A. Worked on the farm some and for the State.

Q. Do you have problems with your hearing? Do you have problems hearing things?

A. Yes, I do.

Q. Have you been to see a doctor about that?

A. Yes, I have.

Q. What's your doctor's name?

A. Moore over here at Bowling Green.

Q. Do you have trouble understanding what people say?

A. Yes, I do.

Q. From the problems you have, would it be possible that the officers advised you of your rights and you

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didn't hear them, or understand them?

A. They might have.

Q. Would it be possible for statements to have been made down there that you did not understand?

A. I might have.

Q. Were in fact statements made by the officers and others there that you did not understand? Did you understand everything that was said down there when you was down there at the Marijuana patch? Did you understand everything?

A. No, sir.

Q. Who else came down there? Did David Davenport come down there?

A. Yes, he did, and Doc Petty.

Mr. Wilson: That's all, Your Honor.

The Court: Anything further? Do you want the medical testimony?

Mr. Wilson: I have the deposition and I want to present it. It is in the record, Your Honor.

The Court: You may step down, Mr. Oliver.

Mr. Wilson: Your Honor, I understand the deposition has been filed in the record

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and will be considered by the Court for this purpose.

The Court: Yes, sir. Very well, is there anything further?

Mr. Wendelsdorf: Just in the form of argument, Your Honor. We can also offer a stipulation.

The Court: State what the stipulation is.

Mr. Wendelsdorf: Comes the Defendant and the United States by respective counsel and by stipulation admit into evidence, with leave of the Court, four photographs, Government's Exhibits numbers 1 through 4, and an aerial map to be labeled as Joint Exhibit Number 1, which has been labeled with the following landmarks: Kentucky Highway 379; The Oliver house on the Oliver property; the location of the locked gate mentioned in the testimony; the location of the barn and camper mentioned in the testimony; and the location of the two fields in which Marijuana was subsequently found. These fields are labeled

A and B. Government's Exhibits 1 through 4 are photographs of Field A. The parties also stipulate that the Marijuana fields are not visible from the river, which is separated from the fields by impenetrable barriers. The scale of the map is stipulated to be one inch on the map equal to six hundred feet on the ground. Is that

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fair?

Mr. Wilson: Yes.

Mr. Wendelsdorf: The United States so stipulates and I will ask Defense counsel if he stipulates to what I have just said.

Mr. Wilson: Yes, plus the posted signs.

Mr. Wendelsdorf: The parties also stipulate that there was a posted sign indicated by the "X"s at the juncture of Highway 379 and the gravel road leading into the Oliver farm, and also another posted sign at the locked gate. These posted signs are delineated by "X"s at the locations so stipulates. (sic.)

Mr. Wilson: That is a fair stipulation, and we agree to it.

Mr. Wendelsdorf: Your Honor, that's all except for argument.

The Court: I will hear your argument.

Mr. Wendelsdorf: First, Your Honor, I would point out to the Court that the Government stands by its objection to the Court's consideration of the deposition seeing as it was not taken pursuant to the rules with leave of Court, that there has been no showing that the witness is not available to testify. However,

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I understand the Court has already ruled, but my objection was not on the record. If the Court will examine the deposition, you will notice that the physician did not see Mr. Oliver professionally until October 21, 1980, which is well

in advance of this trial date, but sufficiently after the initiation of these proceedings that one could draw the conclusion that he went to see the doctor specifically to build a case for these proceedings. There is no evidence whatsoever presented to the Court that Mr. Oliver has been seeking professional help for his hearing problem on a long-term basis, certainly not all after it became to his advantage to have a doctor document his hearing problem.

The Court: Did not the lay witness, the witness offered by the United States, himself state that Mr. Oliver had a hearing problem, or am I wrong?

Mr. Wilson: Yes.

Mr. Wendelsdorf: Yes, Your Honor, and I would like to call the Court's attention to page 4 of the deposition where the doctor very clearly points out that the Defendant is not deaf, but that he has a fifty-two percent, I guess you might say his speech discrimination ability is fifty-two percent in one ear, and sixty-eight percent in one ear, and he indicates on

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page four that this discrimination would vary depending on the environment in which he was having the conversation.

The Court: Does that mean that in one ear he would only be able to understand sixty-eight percent?

Mr. Wendelsdorf: Well, according to the deposition, and of course this is exactly why it would be advantageous to have the doctor here for cross-examination, you cannot cross-examine a piece of paper.

The Court: Do you want to call him?

Mr. Wendelsdorf: No. The proof has been heard, but he explains what he means by that and what he says is that in a normal conversation Mr. Oliver would be able to hear fifty-two percent of that in one ear and sixty-eight percent in the other, but he points out that this discrim-

ination would vary depending upon the environment in which he was having the conversation. Now, Detective Hadley testified that he was aware of the Defendant's hearing problem, that he spoke very close to him and in a loud voice, and that the Defendant indicated through his responses to his questions that he understood not only what Detective Hadley was asking him in general, but in specifics the Miranda rights which

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Detective Hadley had given him. Now, very clearly we have a credibility problem here. We have one witness saying, I gave him his rights. He indicated to me that he heard those rights and that he understood them. We've got another witness who testifies that he was never given the rights. This is, of course, a mixed question of fact and law for the Court to determine. However, I would point out that there are other grounds upon which the statements may be admitted even if the Court should find that he did not hear the rights given to him by Detective Hadley. For example, as I pointed out in my response to the Motion to Suppress the Statements, the Miranda rights only attach during custodial interrogation and I have cited cases in my response dealing with non-custodial interrogations, one where an IRS agent interviews a person in his own home. That is not custodial investigation. Here we have a situation where it was the Defendant who stopped his car because he saw the police officers behind him in an unmarked vehicle. He volunteered the initial statements, I know why you are here. I will meet you up at the house. Then he goes off to deliver some items to a neighbor. Clearly not a custodial situation. He comes back and there are more conversations, and the remainder of the activities flow from that point forward. At that point, from the house, after he once

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again points out to Detective Hadley he knows why he is there, and he goes up there and Mr. Hadley testifies he gave him his rights and the Defendant understood them. I think clearly under the law we have a variable situation. We have some statements after he was given the Miranda rights. We have some statements volunteered after the rights. But all in all, I think the bulk of these statements came in and were not uttered in a custodial situation, but in the situation of volunteered statements. Here I would refer the Court to the citations in my response. The question we seem to be developing here is whether or not Hester versus United States is still good law. Of course in Hester, a 1924 case cited at 265 US 57, the Court held, and I quote, "The special protection afforded by the Fourth Amendment to the people and their persons, and houses and papers and effects, and is not extended to the open fields. Now, all of this was changed by Katz vs US in 1967, 389 US 352, and here the Supreme Court did away with the old geographic definition of the Fourth Amendment protections and issued its now famous pronouncements that the Fourth Amendment protects people and not places. The new standard became not where the place was protected, but whether the individual has a reasonable expectation of privacy in the area searched, but even in Katz the Supreme Court said, and I quote, again

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from page 351 of that opinion, What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protections.- I don't believe Katz has diluted the power of Hester in any way. Indeed, the Supreme Court of the United States in two post-Katz decisions, one, United States v Santana, 427 US 43, a 1976 case, and also in Air Pollution Variance Board v Western Alfalfa Corporation, 415 US 861, a 1974

case. Both of these cases reaffirm the strength of Hester. In the Santana case, Santana was in a public place. She was not in an area where she had any expectation of privacy. Then it goes one to say, she was not merely visible to the public, but was exposed to public view, speech, hearing and touch as if she had been standing outside her house, citing with approval Hester v US. In the Alfalfa case, the Supreme Court held in Hester v US speaking through Mr. Justice Holmes, refused to extend the Fourth Amendment to sights seen in the open field, and they find in this case, which was a regulatory case where an inspector had entered the land of a company in order to measure pollution, the Court held that this was well within the open field exception to the Fourth Amendment approved in Hester, so although the standard is changed, Hester is still good law, not because of the geographic theory, but because the Supreme Court is

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saying an open field is not an area where a person has a reasonable expectation of privacy. I cite other cases in my response. Consider also, Your Honor, the fact that the Defendant denies any interest whatsoever in the property. He testified from the stand that he had leased this property supposedly to these two individuals for a period of six months. He testified from the stand that when he leased the property he considered it as if they owned that property for the term of the lease. He said he never went up there and never checked with it. How can this Defendant have a reasonable expectation of privacy of property which he says somebody else owns? There was no violation. This falls within the open fields exception and approved by the Supreme Court in Hester and reaffirmed by post-Katz decisions, and this was not even from the Defendant's testimony, where he could have an expectation of privacy.

The Court: Mr. Wendelsdorf, what effect did the locked gate and four trespass signs have upon this in view of Hester and Katz?

Mr. Wendelsdorf: Well, I would think it would have more significance pre-Katz than it does post-Katz. In the pre-Katz environment geography was the all-important factor. In the post-Katz environment it is reasonable expectation of privacy, and the

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Supreme Court pointed out in Katz and subsequent cases, even if somebody does something in their own home, if it is open to public view and scrutiny then they do not have a reasonable expectation of privacy. As the Fifth Circuit Court of Appeals held in the case of US v. Williams, 581 F2d 451, that since Katz the application of the Fourth Amendment has been subject to a reasonable expectation of privacy. The open fields surrounding the house are not protected under the Fourth Amendment and a search of them need not be pursuant to a search warrant issued upon probable cause. The gate in question merely locked the road. It did not lock access to the land. As the detective testified, there was a gate across the road, but no fence. Persons could freely walk around the gate and enter the land, which is exactly what he did in this case, but the whole purpose of the open field exception is that even where there is a trespass, even when there is admittedly a trespass, as the Government admits there was here, the open field exception says the evidence is still admissible because that search is not unreasonable. Why isn't it? Because it is activity carried out in the open where anybody can see it, and even if the officer must trespass to get to the open fields, the evidence is admitted. I would refer the Court finally to the Ninth Circuit case of the US v. Basille, reported at 569 F2d

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1053, a 1978 case, where this very question was addressed by the Court. The Court in Basille held the Fourth Amendment protection against unreasonable searches and seizures does not extend to open fields, again citing Hester and a post-Katz case. Ever since Katz v. US the determination of whether a search was reasonable has depended upon a reasonable expectation of privacy, and whether it was reasonable. The Fourth Amendment protections do not extend to the open fields area surrounding the house and immediately adjoining curtilage. Therefore, any information obtained as a result of an open field which is a curtilage to the house results in a lawful acquiring of that information. I think it is information that the trespass does not vitiate the validity of the search in this case.

The Court: Do you argue then that the trespass signs are . . .

Mr. Wendelsdorf: Irrelevant.

The Court: In any case?

Mr. Wendelsdorf: Yes, Your Honor. Now, they are relevant to the extent that they may tend to show a reasonable expectation of privacy. In this case, however, the fact that there were merely trespass signs, but no physical barrier would certainly be relevant.

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The Court: The locked gate and the trespass signs give me a problem because I don't think we are dealing, we know we are dealing with a field.

Mr. Wendelsdorf: Yes, sir.

The Court: Are we dealing with an open field that invites casual intrusion, or are we dealing with a field which was posted, a field that had a locked gate on it, which would give notice to someone coming down the road or going around it that that land was private, and subjectively the man thought putting the trespass signs up

and locking the gate across the road in a remote area would protect his privacy. I think that's a real problem.

Mr. Wendelsdorf: I agree with that, Your Honor. That raises a problem, but we must balance that with the Defendant's own assertion that he did not even consider that to be his property during the lease. I would say this. The Sixth Circuit of Appeals has not had occasion at least to my knowledge, maybe Bob has found something else, any reason to rule on this open fields decision for the last sixteen years. I don't believe the Sixth Circuit has been faced with the issue in a post-Katz situation. I would only ask that should the Court feel that this evidence requires suppression that this ruling be made prior to the attachment of

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jeopardy, and the United States be given leave to present the issue to the Sixth Circuit, and we could resolve it once and for all, and I would say that I only mention that in the spirit of fairness, because I believe the facts and the law as it stands now clearly show this to be a permissible search, but I do not want to jeopardize my client's case.

The Court: Yes, sir. I will hear you, Mr. Wilson.

Mr. Wilson: Your Honor, with reference to the first argument, the first motion, with reference to our motion to suppress the statements supposedly made by the Defendant, in the deposition of Dr. Moore, on Page 4, line 9, quote: Speech discrimination means that under ideal circumstances with the best accoustics available he would hear fifty-two percent. He would understand fifty-two percent of the words spoken in his left ear, and approximately sixty-eight percent of the words spoken in the right ear. Now, someone with a hearing problem or impediment like this learns to compensate. They shortcut. They make answers to questions they don't really understand. I do not doubt that if Mr. Oliver's right were read to him he very easily

could have said, Yeah, that's okay, pal. That's his by word he usually uses.

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The Court: What is the by word?

Mr. Wilson: Pal or Pallie. I guess that's what he said. I am supposing that has not been proven. It is the burden of the Government to prove that an intelligent waiver was made. Now, the way these things are ordinarily proven is have a signed statement of waiver of rights, or at least a signed statement that the person has had their rights read to them and do understand those rights. Here there was no written statement presented. All of the deals are orally spoken words that become incomprehensible to Mr. Oliver. The Court had occasion to observe him from the stand and care had to be taken by both counsel for the Government and the Defense in order to make sure that Mr. Oliver understood our questions, and was able to make an answer. I doubt if that care with the Defendant's rights was taken in that Marijuana field. Dr. Moore further states in his deposition that any interference by background noise would further complicate matters such as a motor running on an automobile or a bushhog running in a field. We think it's not enough when faced with a problem that they have here, when the officer himself admits, yes, I knew he had a hearing problem. Why could he not then present to that individual the written forms that the State Police has in their possession and always uses?

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Why could he not simply ask Mr. Oliver to read this document and see if he understands it? That would not be too much to ask when the officer himself was on notice he was having difficulty hearing. Now, I agree with Mr. Wendelsdorf that there is a mixed fact and law question here. So there is some credibility gap, but the fact is uncontradicted that the man had a severe hearing loss, that the officer knew

that he had that loss, that the Government has a burden of proving an intelligent waiver, and they didn't take advantage of the fact that they had forms available to them for him to sign and for him to read his rights himself.

The Court: Given what you say is true, and I find from the statements of the officer, from the statements and observations of this Defendant, from his demeanor on the stand, that I don't believe he has the capability of deception. I find he has an extremely difficult hearing problem. I find that the Government has not met their obligation, under those circumstances to prove or to establish a voluntary waiver. I so find. How then, though, do you overcome the fact that Mr. Oliver was not in custody? How do you overcome the fact that these statements were voluntary and at least the original statements made to this officer were spontaneous? I think we have a problem in presenting our

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evidence, Mr. Wendelsdorf, under those circumstances, but I cannot find a voluntary waiver. I do not believe the Government meets its burden there, but I do have a problem at this time, and you had perhaps better address it before I make my final ruling.

Mr. Wilson: Your Honor, in response to that question, I will ask the Court to consider the circumstances as existed down there that day. These officers had just come from Mr. Oliver's property and had found what they say is approximately eight acres of Marijuana growing thereon. They went out to seek and find Mr. Oliver and did so find him. Now, I have problems with the statement that was made on the road. If the Court believes that that statement was made in the manner in which the officer says, which we deny, but if Mr. Oliver voluntarily said, I know why you are down here. Meet me on down at the farm and I will show it to you, then I will have to admit that under these circumstances that would be admissible. If that's all that

was said, if that was the first words that were spoken, but then he was under directions to go to the farm, and if Your Honor please, he spent several hours down there, long enough to make searches on this farm, long enough to destroy what they say was eight acres of Marijuana. Was there, according to Mr. Oliver's testimony, until approximately eight o'clock that night before they released him.

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Of course he was under arrest. They read him his rights. You don't read the rights to somebody who was not under arrest. He was in the custody of the officers. They say they read him his rights. If they did, they had to arrest him or did arrest him. They had him in their custody, and he so admits. He wasn't free to go to Louisville. He was free to do only as those officers demanded. I take the position that after the officers had the information that Marijuana was on that premises, and they held him in their custody at the farm, that the statements made at the farm would be inadmissible as being responsive to the questions from the officers. Officer Hadley says, I was wanting to talk to him, so I could question him, and he did so question him without receiving an intelligent waiver of his Miranda rights. Now, I am like the Court. I have problems with the statement on the road, but those questions thereafter when his freedom was restricted, when they had evidence against him and when the officer himself admits the purpose for his retention was to question him, then those statements thereafter would not be admissible.

The Court: Very well, anything further.

Mr. Wilson: Now, do you want me to address the other issue?

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The Court: Yes, sir.

Mr. Wilson: If Your Honor please, with reference to the motion to suppress the Marijuana actually seized . . .

The Court: There was a second reading of the Miranda rights, was there not?

Mr. Wilson: What's that?

The Court: There was a second reading of the Miranda rights? It was given twice?

Mr. Wilson: According to my client, he was given his Miranda rights in the automobile by State Police Officer David Bunch at approximately eight o'clock that night after the statements were made.

The Court: Very well.

Mr. Wilson: Your Honor, one of these cases, Burkholder v. Superior Court for the City of Hester, a California case which I furnished a copy to the Court, 158 Cal Rptr 87, has some interesting language that addresses the question that you asked the United States Attorney. In that case the facts were identical to this one. It was a locked gate, a posted area. The main difference was that one of the gates the officers picked to go through. The other ones they skirted around an area that was unfenced next to the gate. The Court there held that a warrant should have been

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required. Now, people who live in the country in order to have an expectation of privacy shouldn't have to put big fortresses up all over their property to make sure they have every square inch of their property completely fenced. This was fenced property. That was property that was hidden. This was property that was posted. This was property that the officer admits that he knew was posted, and that's the point. No matter how good a job it was, the officer knew, admitted, that there was a no trespass sign there. He knew this property was posted. Now, how many ever signs were there, this specific officer that went there has made an admission and did know that he in fact was going upon property that was posted. He was

acting on a tip that he had received. Now, as far as the question concerning Mr. Oliver's standing and the lease issue, the Government, as I perceive their theory of this case, and I could be wrong, I perceive their theory of this case to be that Mr. Oliver was using his land to grow Marijuana, that he might have used other people to lease his land so they could grow it, but they themselves say that Mr. Oliver was making the statements that he was losing a lot of money. The Government's theory has to play some interest in this crop to Mr. Oliver. His knowledge after the fact that Marijuana might have grown there would not be sufficient to sustain a conviction. He is charged

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with actually manufacturing Marijuana.

The Court: Will you seek an aider and abetter instruction?

Mr. Wendelsdorf: Yes, Your Honor. I thank counsel for anticipating the theory of the Government's case, but that's not the theory at all When he is finished I will be glad to respond.

Mr. Wilson: Well, if there is an aiding and abetting, still they have to show some knowledge to him. He had to know in some way that his land was being used to grow Marijuana. Now if he had that knowledge, let's assume that he did for the purpose of this argument, that's an assumption that he did is guilty that he did have some knowledge that the Marijuana was growing there and participated in some manner, then he had property there that was fenced, that was posted that had a locked gate, that was surrounded by huge hedgerows and trees that you couldn't see it way back up on his property. He had a right to reasonable expectation of privacy. That was still his land, land he had title to, and we believe he has standing. Since the Katz case there have been many juris-

dictions cited in my memorandum that have specifically found that there is something wrong with the situation where an officer cannot stop for a minute in the protection of a Defendant's right and go before

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an impartial magistrate and ask for a warrant. It's a simple thing to do. In this case they had the right probably to resort to helicopters, which were available to them only two weeks later in Marion County. They did not choose to do that, to actually view the Marijuana. Courts have sometimes held that you don't have a reasonable expectation regarding the aerial surviellance, but I believe a person has a reasonable expectation when he posts his property and locks his gates. He is in an area where you have trees grown up and hiding it. He has a reasonable expectation that he won't be trampled upon by anyone coming on his property. They won't be on his property. Thank you.

The Court: Do you have some further response?

Mr. Wendelsdorf: Well, Your Honor, the issue of standing of course is totally separate from the reasonable expectation of privacy. I think what the Defendant is trying to do is at least legally trying to have his cake and eat it too. When it comes to the question of culpability, he said I never bothered , I never when up there, and I never paid attention to what was going on. When it comes to culpability he has no interest in the property. When he has a reasonable expectation of privacy, all of a sudden he has privacy. He had

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the gates locked and had it posted. He had a very varied interest in protecting the property. The Government's theory is not that the Defendant manufactured the Marijuana or cultivated the Marijuana, but that he aided and abetted its cultivation. Proof would tend to show that he

leased the property with an angreement for a great deal of money knowing that it would be used . . .

The Court: Eight hundred dollars?

Mr. Wendelsdorf: No, Your Honor, the statement about the one hundred thousand would be the proof the Government would rely upon for that.

The Court: And do you say that he said he was getting a hundred thousand dollars?

Mr. Wendelsdorf: No, sir. Of course, I don't want to get into what the proof would be, but his statement about losing one hundred thousand dollars by destroying the Marijuana was a reference to the fact that he would in fact receive some of the profits from the manufacture of these drugs.

The Court: Then I would have to read more into the record than is here to come to that conclusion, would I not, at this point?

Mr. Wendelsdorf: Yes, Your Honor. Of course, now, it was Defense counsel who tried to get into the Government's theory and I will get away

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from it if the Court will just ignore it in its deliberations, but I would point out that whether or not be had a reasonable expectation of privacy is totally different from the standing. All standing does is give him a right to challenge the search. I realize he has standing, but whether or not he had expectation of privacy, I think it is altogether a different situation. In a California State case interpreting presumably the California Constitution is a far cry from the Supreme Court of the United States, and the Circuit Courts of the United States interpreting the law which is at issue here concerning the Fourth Amendment of the United States of America. It is well established in this case, apparently the Supreme Court of California chose to be more strict. Haply (sic.) for the Govern-

ment, we are not bound by the State of California Constitution when relying upon the Fourth Amendment.

The Court: Anything further? I will do some further research during the remaining lunch hour and I will let you know before the jury gets back from lunch.

Mr. Wendelsdorf: Thank you, Judge.

Mr. Wilson: Your Honor, did I give you the cases I have cited here?

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The Court: I don't know whether you did or not.

Mr. Wilson: May I leave them with you?

The Court: Yes, sir.

(Whereupon Court was recessed at 12:25 P.M. and was resumed at 1:19 P.M. in the courtroom out of the hearing of the jury:)

The Court: The evidence which was heard from the stand, the stipulations we have entered into and the exhibits and arguments at the end of all the stipulations will be transcribed.

(Whereupon the Court adjourned in this matter at 1:41 P.M. on November 13, 1980.)

Official Court Reporter affidavit omitted.